

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 A. NEIL CLARK, FIELD OFFICE :
4 DIRECTOR, SEATTLE, :
5 WASHINGTON, IMMIGRATION AND :
6 CUSTOMS ENFORCEMENT, ET AL., :
7 Petitioners :

8 v. : No. 03-878

9 SERGIO SUAREZ MARTINEZ; :
10 and :
11 DANIEL BENITEZ, :
12 Petitioner :

13 v. : No. 03-7434

14 MICHAEL ROZOS, FIELD OFFICE :
15 DIRECTOR, MIAMI, FLORIDA, :
16 IMMIGRATION AND CUSTOMS :
17 ENFORCEMENT. :

18 - - - - -X

19 Washington, D.C.

20 Wednesday, October 13, 2004

21 The above-entitled matter came on for oral
22 argument before the Supreme Court of the United States at
23 11:01 a.m.

24 APPEARANCES:

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1 Department of Justice, Washington, D.C.; on behalf of
2 the United States.

3 CHRISTINE S. DAHL, ESQ., Assistant Federal Defender;

4 Portland, Oregon; on behalf of Respondent Martinez.

5 JOHN S. MILLS, ESQ., Jacksonville, Florida; on behalf of
6 Petitioner Benitez.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-878, Clark v. Martinez, and No. 03-7434, Benitez v. Rozos.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE UNITED STATES

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

These cases implicate the fundamental power of the United States to protect its borders by excluding aliens who arrive at its borders, but are found under the law not to qualify for admission.

This Court held more than 100 years ago in *Nishimura Ekiu* that the power of a nation to forbid the entrance of foreigners within its dominions is inherent in sovereignty and is central to self-preservation. If it were otherwise, the integrity of the Nation's borders and its security would be at the mercy of a foreign power who might choose to foist aliens onto our country or to the self-help efforts of aliens who might leave another country coming to our shores. The migration crises involving Haitians and Cubans over the last 35 years vividly illustrate the adverse consequences of such a

1 regime, and events of recent years confirm that the
2 threats to the Nation's borders and security are not
3 limited to nearby nations.

4 JUSTICE SCALIA: But this Court held only 3
5 years ago that the statute before us here does not permit
6 the Attorney General to hold the alien indefinitely.

7 MR. KNEEDLER: The -- the Court addressed one of
8 the statutes before the Court here. It's -- it's
9 important I -- I think to recognize another statute and --
10 that is -- reflects the background principle of this
11 Court's decision in Mezei. And if I may explain, to do
12 that.

13 This Court made clear in Mezei that an alien has
14 no substantive due process right to enter the United
15 States when the executive branch has determined, under the
16 law, that he has no right to enter the United States. The
17 relevant --

18 JUSTICE STEVENS: But, Mr. Kneedler, recognizing
19 that distinction, is that a distinction drawn by the
20 statute that's before us?

21 MR. KNEEDLER: Yes, I believe it is, but it --
22 but -- but first of all, there is another statute which is
23 highly relevant to this, and that is 1182(d)(5(A), the
24 parole statute. It is the parole statute that -- that has
25 long governed whether an alien who arrives at our shores

1 and has not been shown to be admissible may enter the
2 United -- may enter the United States. The parole statute
3 is set forth at petition appendix 3a -- excuse me -- page
4 3a of our brief. That is the only statute that
5 affirmatively authorizes aliens to enter the United
6 States. That statute is -- obviously confers no rights.
7 It is written entirely in terms of the discretion of the
8 Attorney General, now the Secretary of Homeland Security.
9 It says the Attorney -- the Secretary may, in his
10 discretion, temporarily under conditions that he
11 prescribes and for urgent and humanitarian reasons, parole
12 an alien into the United States. But it says that parole
13 does not constitute an admission, and it may be revoked at
14 any time when the Secretary in his opinion concludes that
15 the purposes of the parole have been satisfied.

16 JUSTICE BREYER: So are you -- are you arguing
17 now that -- that (5)(A) -- (d)(5)(A), is the statute under
18 which you are detaining him and that 1231(a)(6) has
19 nothing to do with the case?

20 MR. KNEEDLER: No. They -- they are independent
21 authorities for the detention --

22 JUSTICE BREYER: So -- so you're arguing -- then
23 you are. You're saying -- this is coming to me a little
24 bit anew. I perhaps didn't read it carefully enough. But
25 I thought -- let's assume you lose on 1231(a)(6), that I

1 can't think of a way. Let's assume that I can't think of
2 a way of applying the same words to your alien to mean
3 something different than were applied to the alien who was
4 in Zadvydas. Suppose you lose on that point.

5 Now you're saying, well, independently of that,
6 we have a different statute under which we can detain him,
7 namely 1182(d)(5)(A). Is that --

8 MR. KNEEDLER: Yes, absolutely, and the -- and
9 the --

10 JUSTICE BREYER: Now -- now is that argument --
11 I mean, I'm sorry that I --

12 MR. KNEEDLER: Yes, and we -- we make -- we do
13 make that argument in our brief.

14 JUSTICE BREYER: -- and that -- and so is that
15 made in the courts below and everything that they're doing
16 in the cases --

17 MR. KNEEDLER: Yes. We made it at -- we made it
18 in both courts below, and we -- and we think it's clear
19 from the background of -- of this statute that it does --
20 that it does confer independent authority.

21 JUSTICE SCALIA: But this statute just -- just
22 goes in a circle because it ends. The way end -- (A) ends
23 is that after revoking the parole, the alien shall
24 forthwith return or be returned to the custody from which
25 he was paroled and thereafter his case shall continue to

1 be dealt with in the same manner as that of any other
2 applicant for admission to the United States, which refers
3 you back to -- to 1231(a)(6).

4 MR. KNEEDLER: No. With respect, it doesn't.
5 1231(a)(6) is an additional -- on its face is an
6 additional grant of detention authority. It is not -- but
7 whereas, the -- the parole authority which -- which for
8 years until --

9 JUSTICE SCALIA: Well, this shall continue to be
10 dealt with in the same manner as that of any other
11 applicant --

12 MR. KNEEDLER: And an --

13 JUSTICE SCALIA: Dealt with includes, it seems
14 to me, 1231(a)(6).

15 MR. KNEEDLER: An applicant for admission
16 includes anyone who has been found not to be admissible to
17 the United States. 8 U.S.C. 1225(a)(1) provides that any
18 -- any alien in the United States who has not
19 affirmatively been found to be admissible is an applicant
20 for admission. And the -- the statutes dealing with
21 applicants for admission or aliens who arrive at our shore
22 establish that detention, even indefinite detention, is --
23 is not only permitted, but required unless the Secretary
24 releases someone.

25 JUSTICE GINSBURG: How would that -- how would

1 that apply to someone who hasn't gotten parole, hasn't
2 gotten any permission, who snuck across the border?
3 That's one of the pieces of this that's incomprehensible,
4 that you are suggesting someone can be detained
5 indefinitely who we allowed in temporarily, but such
6 treatment could not occur with respect to somebody that
7 had no permission at any time to be here.

8 MR. KNEEDLER: Yes. Well, the -- the parole
9 statute -- if someone was taken into custody, the parole
10 -- who had sneaked across the border, that person, under
11 the 1996 revisions, is an applicant for -- for admission,
12 and the parole statute would govern that.

13 As a constitutional matter, and particularly
14 with respect to procedural due process, the Court has
15 suggested in a number of its cases that there may be a
16 difference between somebody who arrives at our borders and
17 -- and is stopped and somebody who -- who sneaks through.
18 At least as a procedural matter, the Government would have
19 to establish that he has no right to be here. But --

20 JUSTICE SOUTER: But may I --

21 JUSTICE KENNEDY: Well, are -- are you saying
22 that if an alien on -- who seeks admission and is denied
23 admission and is at Ellis Island or the JFK Airport, that
24 the Attorney General is -- does not have to consult
25 1231(a)(6)?

1 MR. KNEEDLER: No. We believe the parole
2 statute furnishes independent authority --

3 JUSTICE BREYER: Where does it say -- I mean,
4 the reason I guess I missed it is because when I looked at
5 your table of contents and elsewhere in the brief, it
6 seems phrased totally in terms of 1231(a)(6). That's the
7 heading. Each argument seems to support that. And then
8 on page -- you know, when you refer to this, I guess on
9 page 26, you're talking in a section about what 1231 must
10 be because of the structure of it. And then you refer to
11 other provisions such as the one you're now mentioning. I
12 just didn't pick up that it was a totally independent
13 basis.

14 MR. KNEEDLER: Right. And -- and if I may, the
15 -- the special statutes that govern the parole of Mariel
16 Cubans that we reproduce in the appendix to our brief at
17 212.12 were promulgated in 1987 before 1231(a)(6) was
18 enacted in 1996.

19 JUSTICE BREYER: All right, but where does it
20 say that? I'd like to just glance at it even now. Where
21 does it say that in your brief, that it's a totally
22 independent basis?

23 MR. KNEEDLER: On page 12 -- 26 to 27.

24 JUSTICE BREYER: That's what I read and it was
25 in a structure called the statutory and -- text and

1 structure support the Secretary's detention authority,
2 which is under a bigger heading saying the text,
3 structure, and history of section 1231(a)(6) confirm the
4 executive branch's authority.

5 MR. KNEEDLER: I should -- I should also --

6 JUSTICE BREYER: So perhaps I could be forgiven
7 for not understanding --

8 MR. KNEEDLER: And -- and I should also point
9 out that -- that in -- in our response to the petition in
10 the Benitez petition, we expressly -- we expressly argued
11 that 1182(d)(5)(A) is an independent source of authority.

12 JUSTICE KENNEDY: But if -- if there's a statute
13 that directs you with reference to a class, that statute
14 is applicable, and this person is within that class. So
15 how can you tell us we can't go or that we needn't go to
16 1231?

17 MR. KNEEDLER: My -- my point is that's not the
18 exclusive basis. I'm not saying that it's inapplicable to
19 this category. But --

20 JUSTICE KENNEDY: Well, it might be exclusive
21 constitutionally, but the Congress has acted.

22 MR. KNEEDLER: Or -- or --

23 JUSTICE KENNEDY: And once it's acted, you're
24 controlled.

25 MR. KNEEDLER: Well, or -- or -- but -- but what

1 Congress -- if I may go back to the parole statute, before
2 1231(a)(6) was enacted, the only statute that governed the
3 detention and the release of aliens arriving at our
4 shores, what used to be called excludable aliens, was the
5 parole statute. That provision -- until the aliens before
6 this Court were ordered --

7 JUSTICE SCALIA: By which you mean -- parole
8 statute, by which you mean?

9 MR. KNEEDLER: 1182(d)(5)(A). Yes.

10 JUSTICE SCALIA: Okay.

11 MR. KNEEDLER: And until there is an order of
12 exclusion, even now the parole statute is the only statute
13 that governs the detention and release of the alien. And
14 I think it would be impossible to read into 1182(d)(5)(A)
15 any 6-month limitation or any limitation at all on how
16 long someone can be detained because that statute sets up
17 a presumption of custody with release only in the
18 discretion of the Attorney General, or now the Secretary
19 of -- of Homeland Security.

20 JUSTICE SOUTER: May I interrupt you there, Mr.
21 Kneedler? Because I mean, the question is whether
22 constitutionally we should respect that presumption. And
23 -- and my -- my question basically is this. I can
24 perfectly well understand and I can understand the -- the
25 argument for respecting that presumption. When you're

1 dealing with excluded aliens who are in a literal
2 territorial sense within the border but are never allowed,
3 in effect, beyond a point of initial custody, the ones who
4 are kept at Ellis Island or wherever one may -- may keep
5 them.

6 It is difficult, however, I -- I think to accept
7 what has been called the -- the fiction of custody. When
8 we are dealing with individuals who, although absolutely
9 excludable, were nonetheless welcomed into the United
10 States by a public announcement of the President of the
11 United States, have been allowed into the American
12 population, just as clearly and as readily as they would
13 have been under any other protocol of admission -- and I
14 guess in this case for something like 20 years -- isn't
15 there a point at which the -- the fiction of exclusion
16 simply cannot be accepted for constitutional purposes?

17 MR. KNEEDLER: There are a number of responses
18 to that. First, as a factual matter, with respect to
19 welcoming into the United States, what gets cited for that
20 proposition is a statement by President Carter in May 5 of
21 1980. 10 days later, before the aliens in this case came
22 to this country, he made clear that people should not do
23 this. He encouraged people not to go to Cuba. The INS
24 brought enforcement actions against people who went there.
25 There were criminal prosecutions that were brought. So

1 people were not encouraged to come to the United States in
2 this way.

3 With respect to the regime that you say -- I
4 believe you said they're -- they're admitted just like
5 under any other regime. That is not correct.

6 JUSTICE SOUTER: Well, factually. They're
7 allowed into the country. You know, they can get jobs,
8 own property, et cetera.

9 MR. KNEEDLER: They were allowed into the
10 country under the parole statute that I just read, which
11 makes -- which makes it clear that they are admitted not
12 -- not in a way that confers any rights on them, but they
13 are admitted in the interest of the United States for
14 public benefits under circumstances which make clear that
15 it is not an admission and that --

16 JUSTICE SOUTER: No. I realize but they are
17 admitted in the sense that they say, okay, you can come in
18 and you can do these things, but you get no -- in effect,
19 you get no vested right. We can take it away like that.

20 MR. KNEEDLER: No -- no vested right to come
21 into the United States. It is, in effect, a revocable --

22 JUSTICE SOUTER: All right. But otherwise --
23 otherwise they are treated like any other class of aliens
24 who are admitted into the United States. They are subject
25 to this condition. The United States makes that clear,

1 but they nonetheless can be in the country and do in the
2 country what other aliens can do.

3 MR. KNEEDLER: At the sufferance of the United
4 States.

5 JUSTICE SOUTER: I -- I know. Subject to that
6 condition.

7 MR. KNEEDLER: And -- and the question we have
8 here is when the -- when and if the United States,
9 pursuant to the statute, decides no longer to suffer the
10 aliens being at large, but instead return them to the
11 border, in effect, or return them to detention, this
12 statute makes clear that that -- that whatever practical
13 experience they have had at large in the country is always
14 subject to revocation --

15 JUSTICE SOUTER: No. I -- I realize that, but
16 the problem is you've got a Due Process Clause that talks
17 about persons not citizens. Maybe I can understand the --
18 the fiction that says it doesn't apply to these persons
19 if, for practical purposes, we stop them at the border and
20 we don't let them into society. Once we do let them into
21 society, whether we say it's subject to this condition it
22 can be revoked or not, I find it difficult to see a
23 constitutional warrant for drawing the line that you want
24 us to draw.

25 MR. KNEEDLER: This Court has always treated as

1 the same the custody of an alien who arrives at the border
2 and has not been admitted, whether that person stays on
3 the boat, goes to Ellis Island, which the Court said was
4 not an entry that gave somebody constitutional rights to
5 come here. In the Kaplan v. Tod case, you had the example
6 of a person who was paroled for 9 years and regarded as
7 not being in the United States. And what the --

8 JUSTICE SOUTER: You're giving me prior
9 examples, but the issue here is should we continue to
10 respect that -- what has been called that fiction as to
11 people who are allowed into the country and are allowed to
12 move around like other aliens and, indeed, and by and
13 large like citizens.

14 MR. KNEEDLER: With respect, I think it is not
15 -- it is not a fiction with respect to the constitutional
16 issue because there's a critical difference between, for
17 example, a lawful permanent resident -- a person does not
18 acquire lawful permanent resident status by something like
19 adverse possession, by living in the United States for a
20 long period of time. It is an affirmative grant of status
21 for permission to reside permanently in the United States.
22 It is a grant of a status --

23 JUSTICE GINSBURG: Which can be revoked. Which
24 can be revoked, and that's the -- the distinction that
25 seems to me strange. When somebody commits a deportable

1 offense, they are stripped of whatever right they had to
2 be here. They are, it seems to me, in the same boat as
3 someone who is excludable. They -- they do -- do not have
4 any right to remain no more than a parolee has. We have
5 taken away their right to remain. So it seems to me that
6 they have no status anymore based on a prior admission
7 that we have removed from them.

8 MR. KNEEDLER: This Court -- this Court thought
9 otherwise in -- in Zadvydas 3 years ago where it drew a
10 distinction. It said the distinction between someone who
11 has never entered the country and someone who has effected
12 an entry --

13 JUSTICE BREYER: That's true. That's true.
14 Absolutely we did.

15 And also, I'll assume for argument's sake that
16 you're completely right on the constitutional point.
17 That's just for argument's sake. But assume you are. So
18 there's all kinds of constitutional difference.

19 Still, I don't see how to read the statute one
20 way for one group of people and another way for another.
21 The statutory words in Zadvydas, the words that the
22 Attorney General may detain this individual beyond the
23 removal period, are read in Zadvydas to mean beyond the
24 removal period -- may detain beyond the removal period
25 means for a reasonable time, presumably 6 months,

1 presumptively, related -- reasonable time related to the
2 purpose of the statute which is to find a country willing
3 to accept them. Okay?

4 Now, I haven't found a single case of this Court
5 where you interpret these complicated words one way for
6 one and another way for another. My law clerk found a
7 couple of cases, Communications Work v. Bett and
8 Machinists v. Street, where in Bett particularly the Court
9 strongly implies the contrary. It says you can't read
10 words differently just because we interpreted in one --
11 you know, one statute, they were interpreted in light of
12 constitutional considerations, and now we have -- those
13 constitutional considerations aren't here, but it's the
14 same words. You have to apply it the same.

15 MR. KNEEDLER: But -- but, with respect, the
16 Court did not construe any word in this statute to impose
17 the limitation that you're describing. The -- the way the
18 Court posed the question was does it -- does it
19 affirmatively grant a power for detention of these aliens
20 in these circumstances. At the very beginning of the
21 Court's opinion, the Court put to one side --

22 JUSTICE SCALIA: That's an interpretation.

23 MR. KNEEDLER: Pardon me?

24 JUSTICE SCALIA: It says -- that's an
25 interpretation.

1 MR. KNEEDLER: But -- but --

2 JUSTICE SCALIA: It says the statute does not
3 confer power to hold beyond a reasonable period.

4 MR. KNEEDLER: But -- but the -- the mode of
5 analysis of the Court -- it starts with the introduction
6 to the Court's opinion, and this is at page 682. It says
7 -- of -- of Zadvydas. We deal here with aliens who are
8 admitted, aliens who have not yet --

9 JUSTICE BREYER: Yes, yes. That's right.

10 MR. KNEEDLER: No. But -- but that -- that's
11 setting the Court -- the case up. But then what the Court
12 says, in terms of how it interprets the statute, we
13 construe the statute to contain an implicit reasonable
14 time limitation, the application of which is subject to
15 Federal court review. Well, what is a reasonable time
16 depends upon the circumstances.

17 JUSTICE BREYER: Well -- well, yes, but what --
18 what -- we put in the presumptively 6 months, but we said
19 in our view the statute, read in light of the
20 Constitution's demands, limits an alien's post-removal
21 period detention to a period reasonably necessary to bring
22 about that alien's removal from the United States. It
23 does not permit indefinite detention interpreting it to
24 avoid constitutional threat. We include that once removal
25 is no longer reasonably foreseeable, continued detention

1 is no longer authorized by statute.

2 Now, I don't know what those sentences are doing
3 unless they're interpreting the words I mentioned. And
4 then later in the opinion, we say it's presumptively --

5 MR. KNEEDLER: No. What -- what --

6 JUSTICE BREYER: -- not always, but
7 presumptively 6 months.

8 MR. KNEEDLER: What -- what the -- what the
9 Court was doing was -- the -- the standard that the Court
10 announced at the beginning of its opinion was a reasonable
11 -- a reasonable time limitation, the application of which
12 is subject to court review. As applied to permanent
13 resident aliens, the Court saw a -- a constitutional
14 problem and, in that situation, came up with a presumptive
15 6-month rule.

16 JUSTICE BREYER: Well, it interpreted the
17 statute as doing it. Now, that brings me back to the
18 original question.

19 MR. KNEEDLER: No. No, I don't believe -- with
20 -- with respect, what -- what I believe the Court said was
21 that there is a reasonable time limitation. And given the
22 -- given the distinction that runs throughout immigration
23 laws, this Court said at page 2500 of the Supreme Court
24 Reports in this decision, the distinction between aliens
25 who arrive at our borders and are governed by Mezei, as

1 opposed to people who enter, runs throughout our
2 immigration law, I would think that it would run
3 throughout 1231(a)(6).

4 JUSTICE O'CONNOR: Well, but --

5 JUSTICE SOUTER: All right. I can -- I can
6 agree with you that the different classes are going to
7 implicate different considerations on what is reasonable.
8 But you, as I understand it, go the further step and say
9 there is a presumption, and perhaps an irrebuttable
10 presumption, that in the case of the -- the legally
11 excluded, even though they are, in fact, in the country,
12 the -- the presumptive reasonable period is forever.

13 MR. KNEEDLER: Well --

14 JUSTICE SOUTER: And that's where -- it's that
15 stretch that's giving us the trouble.

16 MR. KNEEDLER: And -- first of all, the Court
17 doesn't have to decide that in this case because we have a
18 regime where each of the aliens before this Court, came
19 here, was paroled --

20 JUSTICE SOUTER: That's true, but we've got to
21 say something.

22 MR. KNEEDLER: But if -- if I may go to the
23 Mezei case, what the Court said there is that the
24 detention of the alien on Ellis Island was effectuating
25 his exclusion. The two cannot be distinguished from one

1 another.

2 JUSTICE O'CONNOR: Well, Mr. Kneedler, do you
3 mind telling us whether the record shows where Martinez
4 and Benitez are now? Where are they?

5 MR. KNEEDLER: Benitez has been released to a
6 half-way house. We sent the Court a letter --

7 JUSTICE O'CONNOR: That's what I thought.

8 MR. KNEEDLER: -- last week showing that the
9 review process under these regulations actually works.
10 It's been working for 15 years. And as we explain in our
11 brief, more than 9,000 people have been granted parole
12 here.

13 JUSTICE O'CONNOR: So is that case basically
14 moot? Benitez's?

15 MR. KNEEDLER: He hasn't been -- he hasn't been
16 -- I think he's still in -- in custody. Whether -- if --
17 if he -- if he completes that and is released, a question
18 of mootness may arise at that point.

19 JUSTICE O'CONNOR: Where's Martinez?

20 MR. KNEEDLER: Martinez was released pursuant to
21 the court -- district court order almost 2 years ago, and
22 he's -- he's now at large under an order of supervision.

23 JUSTICE SCALIA: Mr. Kneedler --

24 JUSTICE O'CONNOR: Now, if I can continue for
25 just a moment and then I'll stop. There is a new statute,

1 1226(a) of title 8, part of the Patriot Act, which allows
2 detention of aliens who threaten our safety or security.
3 Presumably that is an option if either of these people is
4 seen to do that.

5 MR. KNEEDLER: If -- if there's an -- if there
6 is an individualized reason to believe that an alien would
7 be a terrorist or -- or a threat to the security in that
8 respect, but the threat to the --

9 JUSTICE O'CONNOR: And that's available, is it
10 not?

11 MR. KNEEDLER: That -- that's available, but the
12 threat to the national security here is much larger than
13 that. If -- again, if we go back to the immigration
14 crises involving Haiti and Cuba, there -- there is a
15 threat to the national security when another nation can
16 foist aliens onto our shores, and -- and --

17 JUSTICE STEVENS: May I ask you about --

18 MR. KNEEDLER: -- if the United States had no
19 ability to -- to deflect --

20 JUSTICE STEVENS: Mr. Kneedler, can I ask you a
21 question, forgetting the statutes for a moment -- I --
22 which we've already covered at some length? Just going to
23 your constitutional position, it's clear that a person
24 who's not been admitted and has been paroled could be
25 excluded forthwith, summarily, and so forth because he's

1 never been admitted. But does that person have any
2 protection under the Constitution? Could we shoot him?

3 MR. KNEEDLER: No, no, surely. What -- the --
4 the --

5 JUSTICE STEVENS: Then what is the protection
6 under the Constitution that deals -- is it the Due Process
7 Clause?

8 MR. KNEEDLER: Whatever right -- in -- in a
9 criminal prosecution the Bill of Rights would apply to
10 that person.

11 JUSTICE STEVENS: Is he -- is he a person within
12 the meaning --

13 MR. KNEEDLER: Yes. We -- our position is not
14 that he's -- not that he's not a person. The question is
15 what -- is what process is due.

16 JUSTICE STEVENS: And is he a person who has a
17 right to liberty, entitled to some protection, very, very,
18 very minimal, but there is some protection to that -- that
19 individual.

20 MR. KNEEDLER: It -- depending upon the context.
21 The one protection for liberty he does --

22 JUSTICE STEVENS: Well, the context is he got
23 off a boat. We couldn't -- but Cuba won't take him back
24 or -- or whatever -- wherever he came from. They can't.
25 And the only thing we can do to keep him out of the

1 country is to keep him in jail.

2 MR. KNEEDLER: He has no substantive due process
3 right to be released into the United States.

4 JUSTICE STEVENS: He -- he doesn't have a right
5 to be released. But -- but you do not contend that we
6 could kill him.

7 MR. KNEEDLER: No, absolutely not. Absolutely
8 not.

9 JUSTICE STEVENS: He does have some -- some
10 minimal protection under the Constitution.

11 MR. KNEEDLER: Absolutely not. The formulation
12 -- and this was used in -- in the Court's decision in
13 Landon v. Plasencia. The -- the question is there are no
14 constitutional rights in connection with his admission to
15 the United States. And admission means, I think, both
16 formal granted admission and practical admission or entry.
17 A person cannot --

18 JUSTICE BREYER: A person who runs in illegally,
19 a person who crosses the border illegally, say, from
20 Mexico is entitled to these rights when you catch him.

21 MR. KNEEDLER: He's entitled to procedural due
22 process rights. We don't believe he -- that person has
23 any more substantive due process right to remain at large
24 in the United States.

25 JUSTICE BREYER: But you -- you -- I thought

1 there was a reg of the INS.

2 MR. KNEEDLER: No. With -- with --

3 JUSTICE BREYER: Am I not right?

4 MR. KNEEDLER: With -- with respect to the --

5 JUSTICE BREYER: Tell me if I'm right.

6 MR. KNEEDLER: With respect to the regulations,

7 but --

8 JUSTICE BREYER: Can I say what it is?

9 MR. KNEEDLER: Yes, I'm sorry.

10 JUSTICE BREYER: I thought there was a reg -- to

11 be sure we're talking about the same thing -- where the

12 INS has said that Zadvydas applies to individuals who run

13 into the United States illegally from Mexico. Am I right

14 about that?

15 MR. KNEEDLER: The -- the INS`has -- or now DHS

16 has applied it. I -- I don't know that there's an

17 analysis in there that says Zadvydas requires it. I don't

18 think the -- either the statute or particularly the

19 Constitution would give somebody who sneaks across our

20 border a right to remain here, a substantive due process

21 right to be here. Maybe procedural rights would be

22 different, but a substantive --

23 JUSTICE GINSBURG: But is that the current

24 INS --

25 JUSTICE SCALIA: Mr. Kneedler, may I -- may I

1 try to get in the question I did earlier? Is -- is 8
2 U.S.C., section 1182(d)(5) -- was -- was that applicable
3 in Zadvydas, as it's applicable here?

4 MR. KNEEDLER: No, because those were lawful
5 permanent residents whose -- whose lawful permanent
6 residency had -- had -- they came in under a grant of
7 lawful permanent residency.

8 JUSTICE SCALIA: So this is a new string to your
9 bow in this case.

10 MR. KNEEDLER: Yes, because these aliens entered
11 the United States only --

12 JUSTICE GINSBURG: But it wouldn't -- it
13 wouldn't apply to the illegal alien because it's a statute
14 that governs parole and they're not paroled into the
15 United States.

16 MR. KNEEDLER: But someone -- someone who would
17 be picked up would be an applicant for admission and could
18 be released under this -- under this statute. But -- but
19 focusing here on the people excluded at the border --

20 JUSTICE GINSBURG: How does that --

21 MR. KNEEDLER: -- this is the only way someone
22 could --

23 JUSTICE GINSBURG: How does that make that
24 person, the illegal entrant, a parolee?

25 MR. KNEEDLER: He would be an applicant for

1 admission, and the -- I -- I believe -- I believe I'm
2 correct on that.

3 JUSTICE GINSBURG: Suppose he says, I don't want
4 to apply for admission. I just don't want to be locked
5 up.

6 MR. KNEEDLER: The act treats him as an
7 applicant for admission under 1225(a)(1).

8 Mr. Chief Justice, if I may reserve the balance
9 of my time.

10 CHIEF JUSTICE REHNQUIST: Very well, Mr.
11 Kneedler.

12 Ms. Dahl, we'll hear from you.

13 ORAL ARGUMENT OF CHRISTINE S. DAHL

14 ON BEHALF OF RESPONDENT MARTINEZ

15 MS. DAHL: Mr. Chief Justice, and may it please
16 the Court:

17 Because the same words mean the same thing in
18 the same statute, this Court need not reach the
19 constitutional questions presented by the indefinite
20 detention of inadmissible as opposed to deportable aliens.
21 Without going to questions of constitutional doubt, there
22 are three reasons why this Court should hold that section
23 1231(a)(6) treats inadmissible aliens the same as it
24 treats deportable aliens.

25 JUSTICE SCALIA: Before you get to that, do you

1 think that that's the only statute applicable here? What
2 about 1182(d)(5)? What's your response to the
3 Government's assertion that that's an independent basis?

4 MS. DAHL: Justice Scalia, I don't believe it
5 provides an independent basis for detention. The
6 immigration law works together in it's various elements,
7 and section 1182, when parole is revoked, treats the alien
8 then as an applicant for admission, and section 1229
9 places the applicant for admission into removal
10 proceedings.

11 The Government did not obtain a ruling on that
12 argument from the Ninth Circuit, although it made
13 reference to 1182 in its motion to stay the briefing
14 schedule. It ultimately conceded that this case was
15 controlled by Lin Guo Xi, which was a statutory
16 construction of 1231(a)(6), and cert was granted on the
17 1231(a)(6) issue only.

18 The reading of the statute that we proffer, that
19 the same words mean the same meaning, is consistent with
20 the overall changes Congress made in 1996 in IIRIRA when
21 it eliminated the category of excludable aliens and
22 replaced it with a single, broader category, now called
23 removable aliens, that embraces both inadmissible and
24 deportable aliens.

25 Third, Congress knows how to provide for

1 indefinite detention when it wants to.

2 CHIEF JUSTICE REHNQUIST: Well, how do you
3 explain then, Ms. Dahl, the language in the Court's
4 Zadvydas opinion that had, were we dealing with, in
5 effect, this would be a much different case?

6 MS. DAHL: I believe it would present a
7 different question, but the constitutional issues
8 presented by indefinite detention remain. The Court
9 doesn't need to reach those --

10 CHIEF JUSTICE REHNQUIST: So you say that a
11 person, even though they're not lawfully admitted into the
12 United States, still couldn't be indefinitely detained.

13 MS. DAHL: Yes, Your Honor, that is our -- our
14 point precisely. The Government was not correct when it
15 said that it -- that this Court has always treated
16 excludable aliens the same. In a case that was a
17 contemporary of the Mezei decision, Kwong Hai Chew, cited
18 at page 45 of our brief, the Court found that an
19 excludable entrant on Ellis Island was entitled to --

20 CHIEF JUSTICE REHNQUIST: Well, the Government
21 distinguishes that case. What do you make of their
22 distinction?

23 MS. DAHL: We disagree. I think that it shows
24 that the Court will consider length of time in the country
25 in determining what amount of due process is required.

1 Now, the plain language of the statute of
2 1231(a)(6) requires the same treatment between
3 inadmissible and deportable aliens. Where there's no
4 difference in the language that Congress has used, this
5 Court can draw no distinctions.

6 There is a presumption that Congress expects its
7 statutes to be read in the same manner as the Supreme
8 Court's interpretation, and because of the
9 interrelationship between the parole statute and the
10 revocation proceedings and removability proceedings,
11 there's no reason for this Court to resort to the 1182
12 statute to provide the authority that the Government
13 seeks. The relevant authority is section 1231(a)(6).

14 JUSTICE GINSBURG: Well, what do you think we
15 should do with the 1182? Because suppose you prevail on
16 your argument that it's the same statute, the same word,
17 it can't be construed differently under 12-whatever, and
18 the Government says fine. We now go to the other string
19 in our bow and we continue to detain this person on the
20 basis of 1182(d)(5)(A).

21 MS. DAHL: Well, the 1182(d)(5)(A) doesn't
22 provide for indefinite detention. What it provides is
23 that upon revocation of parole, the alien is placed into
24 removal proceedings. Once the removal proceedings have
25 been determined and a final order of removal is entered,

1 1231(a) requires removal within 90 days, and failing that,
2 the appropriate -- the relevant statutory provision is
3 1231(a)(6). That says that the alien may be detained
4 beyond the removal period and then, if released, subjected
5 to conditions of supervision. 1231 is the only statutory
6 authority for post-removal period detention. Parole deals
7 with entry and 1231(a)(6) --

8 JUSTICE O'CONNOR: Well, but you haven't
9 answered, I think, the question of whether the Government
10 is entitled in this case, if we dispose of the 1231
11 question, to resort to the other statute.

12 MS. DAHL: I don't think that the Court could
13 carve out a statute and use it in a way contrary to the
14 way it functions in the immigration scheme and make
15 superfluous or irrelevant a more express, more detailed
16 statutory provision.

17 JUSTICE KENNEDY: Well, what you're saying is
18 that even if 1182 comes first, 1231 comes second.

19 MS. DAHL: Precisely, Your Honor. And I don't
20 think that the Government could revoke parole and then
21 suspend proceedings to determine the admissibility of a
22 parolee indefinitely.

23 JUSTICE BREYER: But still, is this another --
24 could -- could we do this? I noticed that -- that your --
25 the petition for cert in Benitez has two questions, both

1 of which are about interpreting 1231(a)(6). The
2 Government's petition, though not its brief -- the
3 Government's petition in Crawford says the question
4 presented is whether 1231(a)(6) in Zadvydas compelled a
5 release. So this other -- this other matter is a totally
6 -- seen as a totally separate ground. Perhaps the thing
7 to do is we send it back, and if they want to raise it,
8 they can raise it, and it would be up to the circuit to
9 decide whether they had preserved it or not preserved it.
10 Is that -- is that a sensible thing?

11 MS. DAHL: I don't think so because I don't
12 think that 1182 allows the interpretation that the
13 Government --

14 JUSTICE BREYER: And that's your view of -- of
15 what 1182 means, and they're going to have a different
16 view. If they want to argue their different view, they
17 could do it in the Ninth Circuit. If they've waived it,
18 they've waived it, and that's up to them, not up to us.

19 MS. DAHL: What the Ninth Circuit found, though,
20 in questions of an inadmissible alien, that this Court's
21 construction of 1231(a)(6) in Zadvydas applied and there
22 would be no need for resort to any other statute.

23 JUSTICE STEVENS: May I ask if you believe the
24 supervision after the 90-day period covered in
25 subparagraph 3 -- is there -- can that continue

1 indefinitely in your view?

2 MS. DAHL: Yes. While the alien is awaiting
3 removal, he is subject to supervision conditions that will
4 safeguard the Government's interests, and for as long as
5 he is waiting, he is under supervision.

6 It's those supervision conditions that
7 distinguish this case from the situation where the
8 Government is finding national security risks. That --
9 Congress has expressly provided for the indefinite
10 detention of people whom the Attorney General certifies as
11 presenting risks to national security.

12 It's also the presence of a national security
13 risk that distinguishes this case from the Mezei decision.
14 I think that the Government makes more of that decision
15 than needs to be made in order to find that Mr. Benitez
16 and Mr. Martinez are in different situations. They were
17 allowed into this country. They have lived here for 24
18 years, and --

19 JUSTICE GINSBURG: How long had the -- the
20 detainee in, however you pronounce it, Mezei lived in the
21 United States?

22 MS. DAHL: Mr. Mezei had been in the United
23 States for 25 years before he left, and he was gone for an
24 extended period of time. When he sought to return, he was
25 treated as if he were an initial entrant, and the

1 Government, citing national security, excluded him without
2 a hearing and refused to disclose the evidence that was
3 the basis for the exclusion. He challenged that and
4 wanted a hearing and wanted the Attorney General to be
5 required to disclose the evidence. The Court found that
6 his release into the community itself would present a
7 security risk and therefore sustained the denial of the
8 hearing and the detention of Mr. Mezei.

9 JUSTICE STEVENS: Well, I don't think it really
10 said they -- they found there was a security risk. They
11 -- they held the Government did not have to explain
12 because the man had no right to come in.

13 MS. DAHL: That's correct.

14 JUSTICE SOUTER: What's -- what's your best
15 answer to the Government's argument that unless you treat
16 this case differently from Zadvydas, at least for purposes
17 of reasonable time or reasonable interest, which affects
18 time, the United States is basically defenseless against
19 countries that -- that want to dump undesirable aliens and
20 force them into the United States?

21 MS. DAHL: I don't think that applying the
22 statute, as it's written, leaves the Government
23 defenseless.

24 JUSTICE SOUTER: Because.

25 MS. DAHL: Congress can pass another statute, if

1 it needs to, and the Government --

2 JUSTICE SOUTER: But it's defenseless under the
3 present law?

4 MS. DAHL: I disagree. We have --

5 JUSTICE SOUTER: Then what is the defense?

6 MS. DAHL: We have very effective means of
7 interdicting --

8 JUSTICE SOUTER: What are they?

9 MS. DAHL: Well, after the Mariel boatlift, the
10 Government changed its policy and now intercepts people
11 who are coming from Cuba by boat and detains them at
12 Guantanamo Bay, does a screening, and has a more effective
13 repatriation process for people that they do not want to
14 come in.

15 JUSTICE KENNEDY: You want us to take --

16 JUSTICE SOUTER: So you're saying they can
17 actually exclude, in practical terms.

18 MS. DAHL: Yes. That's exactly what --

19 JUSTICE KENNEDY: You want us to take judicial
20 notice that the Mexican border and American border is
21 impervious?

22 (Laughter.)

23 MS. DAHL: I think that would present a
24 different question. As the Government acknowledged,
25 people who come into the country without inspection are

1 entitled, under the Government regulations, to the
2 protections under Zadvydas. And --

3 JUSTICE SCALIA: And there's no -- and -- and
4 there's no answer to Justice Souter's question with regard
5 to people who -- who -- once they enter that way. Right?

6 MS. DAHL: Well, the Government has --

7 JUSTICE SCALIA: Except a new statute.

8 MS. DAHL: Well, Congress has -- has, by
9 definition, treated those people as inadmissible aliens
10 who are subject to removal proceedings. And the
11 interdiction methods are -- they're purely political
12 decisions that the Government needs to make.

13 JUSTICE SOUTER: But they -- in any case, those
14 individuals are not the subject of sort of dumping action
15 by their own governments.

16 MS. DAHL: That's correct, Your Honor.

17 JUSTICE BREYER: Does the -- Congress has passed
18 a special statute with respect to terrorism, hasn't it,
19 where it does authorize detention of any of these people
20 who are engaged in terrorism. Now, I don't know how
21 that's defined. Is that defined to relieve in a way
22 that's broad enough to relieve some of the problem?

23 MS. DAHL: Well, if -- well, first of all, the
24 Government has the ability to detain, pending the removal
25 proceedings, of people who are trying to come into the

1 country. The question becomes if they can't be
2 repatriated. Now, the Patriot Act in 1226(a) does allow,
3 in instances of national security, for the Attorney
4 General to indefinitely detain. Now, importantly, that
5 statute provides for procedural protections and judicial
6 review, but it is absent from --

7 CHIEF JUSTICE REHNQUIST: But are -- are the
8 people here charged with any sort of terrorist activities?
9 They were committed -- convicted of crimes, but I -- I
10 didn't think they were connected with terrorist
11 activities.

12 MS. DAHL: That's correct. The Government has
13 not made any allegation that there's --

14 JUSTICE SCALIA: Just normal, harmless
15 criminals.

16 CHIEF JUSTICE REHNQUIST: Yes.

17 JUSTICE SCALIA: Right?

18 (Laughter.)

19 MS. DAHL: Their release from prison presents
20 the same issues that the release of any person who has
21 served the sentences that were imposed after the
22 commission of a crime.

23 CHIEF JUSTICE REHNQUIST: Well, except that with
24 aliens, they can be deported, whereas a citizen can't be,
25 upon release from prison.

1 MS. DAHL: That's correct. And the conditions
2 of supervision that the Government can impose are much
3 lengthier and could be even more onerous than the kinds of
4 supervision conditions after prison that the Government
5 could impose on its citizens.

6 In this case, Mr. Martinez and Mr. Zadvydas both
7 received permission to live here. Both committed crimes.
8 Both served their sentences and both were ordered removed.
9 Nothing in section 1231(a)(6) warrants making Mr. Martinez
10 wait for removal in a Federal prison perhaps for the rest
11 of his life, while Mr. Zadvydas awaits removal after
12 having been released --

13 JUSTICE O'CONNOR: I thought the other person
14 was named Benitez. I thought we had Zadvydas in the other
15 case. Do we have two, a Martinez and a Benitez, here?

16 MS. DAHL: Yes, Your Honor. I was drawing a
17 comparison between the situation with Mr. Zadvydas and Mr.
18 Martinez.

19 Detention, of course, needs to be reasonably
20 related to its purpose. Here removal cannot be achieved.
21 So detention for that purpose becomes arbitrary and
22 punitive, and we'd ask the Court to affirm the grant of
23 habeas corpus and Mr. Martinez's release on supervision
24 conditions.

25 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dahl.

1 Mr. Mills, we'll hear from you.

2 ORAL ARGUMENT OF JOHN S. MILLS

3 ON BEHALF OF PETITIONER BENITEZ

4 MR. MILLS: Mr. Chief Justice, and may it please
5 the Court:

6 I think that we have lost sight of the statutory
7 scheme that applies here. Section 1182(d)(5)(A) is not a
8 detention statute. It's clearly not preserved as an
9 initial matter. It was not in the answer to either habeas
10 petition. The justification given in the district court
11 in both cases was 1231(a)(6).

12 But, Justice Breyer, there is no need to remand
13 this case because a clear, simple reading of the
14 immigration statutes demonstrates that 1182 is not a
15 detention statute. You have to go through the process,
16 and I attempted to do this in my reply brief, but I think
17 I can do it a little bit more clearly for the Court this
18 morning.

19 When an alien first arrives, he's an applicant
20 for admission. Section 1225(b)(2)(A) of title 8, United
21 States Code says an applicant for admission -- any
22 applicant for admission shall be detained until the
23 removal proceeding unless it is clear, beyond any doubt,
24 that they are entitled to come in. So all aliens, when
25 they apply -- that's the detention statute that initially

1 applies, 1225(b)(2)(A). They are to be detained until
2 there is a removal proceeding. The removal proceeding,
3 which is governed by 1229(a)(1) -- I'm sorry -- 1226(a) --
4 it is 1229(a) -- is to determine whether the alien is
5 admissible or not, whether they should come in or whether
6 they must be removed. So 1225(b)(2)(A) says detain until
7 that point.

8 1182(d)(5)(A) then comes in to authorize the
9 Government to stop that process for humanitarian reasons
10 and parole an alien in. We won't have the removal
11 process. We're going to -- we -- we're going to get out
12 of the detention in 1225(b)(2)(A), and we're going to let
13 you out on parole, which is discretionary. That's
14 1182(d)(5)(A).

15 If at any time, we in our discretion think it is
16 no longer appropriate to keep you on parole, we can revoke
17 that parole, and the statute 1182(d)(5)(A) says once
18 parole is revoked, the alien is treated as, quote, any
19 other applicant for admission. So you go back to
20 1225(b)(2)(A), which says detain them until the removal
21 proceeding.

22 JUSTICE SOUTER: Well, you -- you skipped a -- a
23 phrase. It says when the Attorney General is of the
24 opinion that the purposes of the parole justify nothing
25 more, the individual shall return or be returned to the

1 custody from which he began. And their argument is that
2 custody is different in these cases.

3 MR. MILLS: That custody is the custody under
4 1225(b)(2)(A). That is the statute that authorizes the
5 custody. That's what they're being returned to.
6 1225(b)(2)(A) is detention until the removal proceedings.
7 And in the Demore v. Kim case, this case -- this Court
8 said that even if it's a long time and there aren't other
9 procedures in place, you can be detained until your
10 removal order is entered because -- and -- and the
11 emphasis was there's an end date to that. So there's an
12 end date to detention under (b)(2)(A), 1225(b)(2)(A), and
13 it's the removal proceedings.

14 Section 1231 is the statute that governs removal
15 and says, okay, now what happens? It says you have to
16 remove within 90 days, but for certain aliens who've
17 committed crimes or are inadmissible or are otherwise
18 determined to be dangerous, we can detain them beyond. It
19 says may be detained beyond the period. That is the only
20 statute that authorizes any detention of an alien after a
21 removal order other than the specific terrorist statute,
22 1226(a), which was enacted, which does not authorize
23 indefinite detention. It says -- it has a paragraph
24 labeled indefinite detention, and it says the Government
25 shall not indefinitely detain a terrorist alien that it

1 cannot remove except that if the Government determines --
2 and -- and it appears to put the burden on the Government
3 -- that the person is a danger to national security or the
4 community, it can detain them for another 6 months. And
5 then you -- you could have indefinite detention, but each
6 time, each 6 months, the statute provides for review.

7 So not only do the sneakers, the aliens who
8 cross across the border in the -- in the dark of night
9 from Mexico or wherever -- not only do they under the
10 Government's own admission have the Zadvydas rights, so
11 too do terrorist aliens by statute. And to suggest that
12 by some implication Congress has intended to authorize the
13 indefinite detention of people that we thought we should
14 welcome into our country, even though we didn't have the
15 ability under our quota system and under our current
16 regulations in 1980 to let them in, somehow they have no
17 rights against indefinite detention.

18 For the Government to --

19 JUSTICE GINSBURG: How do you -- how do you
20 answer the Government's argument that this is necessary,
21 that the United States shouldn't effectively be punished
22 for being humanitarian, and if we can't hold these people,
23 if we're forced to let them in, then any rogue nation can
24 dump anyone it wants on the United States and we can't
25 stop it?

1 MR. MILLS: Yes, Your Honor. Justice Ginsburg,
2 that's their sole policy argument, and frankly, it doesn't
3 hold water. Just yesterday in the Jama case, the
4 Government took the position that if Mexico flooded --
5 flooded our borders with illegal aliens who we could not
6 detain, we know under their own regulations, if they snuck
7 in, we couldn't detain them, but if a new Mexican -- there
8 was a Mexican dictator and he flooded our borders, could
9 we forcibly repatriate them? And the Government said
10 absolutely we can. We can go down and put them back in
11 Mexico. We could do that with the Cubans. We could let
12 them out the gate at Guantanamo Bay.

13 If a -- a rogue nation truly invades our country
14 with its bad aliens, that is an infringement on our
15 sovereignty, and I think that's an act of war. And I
16 think the President has all kinds of options: trade
17 sanctions, go to the United Nations, diplomacy. If it's
18 really something bad that's going to be a -- a threat to
19 our national security, I think --

20 CHIEF JUSTICE REHNQUIST: Well, you -- you might
21 wait a while if you went to the United Nations or --

22 (Laughter.)

23 CHIEF JUSTICE REHNQUIST: -- or to -- I take it
24 the Government feels you need some sort of a rather
25 immediate recourse.

1 MR. MILLS: Sure, and our Government has
2 demonstrated that it believes in preemptive -- preemptive
3 action and we can go in and have regime change in Cuba if
4 it -- if it is such a threat. If it's a political
5 decision, the purely executive decision, that our national
6 security is so threatened, they have all kinds of tools.

7 JUSTICE SCALIA: But this -- this regime is not
8 sending, you know, an armed flotilla to Florida. They
9 just --

10 (Laughter.)

11 JUSTICE SCALIA: -- they just open their jails
12 and say, hey, you know, go wherever you want. And these
13 people say I want to get out of here, and they go to
14 Florida. You -- you want us --

15 MR. MILLS: That was less than 1 percent --

16 JUSTICE SCALIA: -- to bomb Cuba because of
17 that.

18 MR. MILLS: That was less than 1 percent of the
19 Cubans who came in the Mariel boatlift. That did occur,
20 and we do have options for dealing with them. We can
21 return them forcibly. If they don't allow us, that's like
22 them sending a missile. It's -- we -- we can destroy the
23 missile. We can't destroy a human being. By punishing a
24 human being that Castro sends over, we're not sending a
25 message to Castro. We're not saying, ah, you sent your

1 prisoners over here and were going to indefinitely detain
2 them. Mental torture. That will teach you. That's --

3 JUSTICE SOUTER: What you -- what you mean when
4 you say we can forcibly return them is literally we can
5 take them to Guantanamo, take them to the gate, and push
6 them out?

7 MR. MILLS: That's one option. If there -- if
8 the Cuban army is there to prevent us, you know, maybe it
9 would require some military action that the administration
10 might decide is not advisable. But those are the options
11 depending on the size of the threat. So a judicial
12 interpretation that the statute means the same thing in
13 all contexts does not deprive the Government of anything.

14 And I'd like to go back to that if I could.

15 JUSTICE GINSBURG: I thought -- maybe I -- I
16 misunderstood you, but I thought that one of your points
17 were even assuming that we couldn't send these people back
18 into Cuba without having a major conflagration, the rogue
19 dictator is not going to be deterred by our tossing even
20 into the sea the people that he doesn't want.

21 MR. MILLS: That -- that is my point. That's
22 the point that I -- I intend to make, that indefinitely
23 detaining these people -- that does nothing to a dictator.
24 That does nothing to deter a dictator. All it means is
25 we're going to be incurring the huge cost of incarcerating

1 a large number of people, and if anything, that may
2 encourage the dictator to do exactly that, or it may
3 encourage the dictator, instead of sending them to Key
4 West on boats -- on American boats, to sneak them up on
5 speed boats or take them through Mexico and sneak them
6 across the border that's --

7 JUSTICE BREYER: Anyway, it's a little drastic.
8 I -- I guess that before this happens, Congress might
9 enact a statute like the terrorist statute.

10 MR. MILLS: Exactly. That -- that is exactly
11 correct, Justice Breyer. And if they think -- whether a
12 -- a Cuban, a Mariel Cuban, can be put in jail -- and
13 these are in prison for the rest of their life -- is a
14 huge policy decision. And this Court should abstain from
15 putting its voice as -- on to the answer. That is a
16 decision for Congress in the first place.

17 In Zadvydas, this Court said the statute doesn't
18 clearly do that, so we're not going to -- we're not going
19 to answer that question as to whether it would be
20 constitutional.

21 JUSTICE KENNEDY: Well, it's a policy decision
22 either way. I -- I suppose if Zadvydas had come out the
23 other way, the Congress could have responded as well.

24 MR. MILLS: That's correct. But in -- in this
25 case, because especially the Zadvydas aliens had clear

1 constitutional rights, we avoid the question. The
2 doctrine of constitutional avoidance says the Court
3 doesn't engage in that. The default is to stay away from
4 it. If Congress wants to do something that might be
5 unconstitutional, they can come back and do it and then
6 the Court will determine whether it's unconstitutional.

7 Back to the point of whether 1231(a)(6) can mean
8 something different for the two groups of aliens. Never
9 before has this Court taken a statute that --

10 CHIEF JUSTICE REHNQUIST: How do you explain,
11 Mr. Mills, the language that the Court used, pointing out
12 how different this kind of a case would have been from the
13 -- from the Zadvydas case?

14 MR. MILLS: Sure. My reading of that -- of that
15 decision, there were two parts of the decision. There was
16 part one, which examined whether there is a -- or it
17 determined whether the statute is ambiguous, and part two
18 is whether there's a constitutional error. It was only in
19 the part of the decision deciding whether there's a
20 constitutional problem that the distinction was made. The
21 distinction makes the difference in whether there's a
22 problem or not. And maybe there's not a problem for
23 inadmissible aliens.

24 So, the Court then concluded in Zadvydas that
25 because there's a problem, we look at the statute. This

1 statute could be interpreted to authorize indefinite
2 detention or not. It's ambiguous. Because we have a
3 problem, at least with one category, we're going to choose
4 the -- a safe route.

5 JUSTICE SCALIA: It might have been a -- a means
6 of warning Congress off one area, but not the other. That
7 is to say, just because we think there's a constitutional
8 doubt here and therefore Congress might be sailing close
9 to the wind if they tried to overrule our opinion by
10 statute doesn't mean that Congress couldn't in this other
11 area alter the result in *Zadvydas*.

12 MR. MILLS: I think that that is absolutely a --
13 a conclusion that can be drawn that Congress --

14 JUSTICE SCALIA: Of course, I dissented in that
15 case. So I'm not saying this was a good idea.

16 (Laughter.)

17 JUSTICE BREYER: But it -- it's interesting. In
18 -- in just my -- for my -- my own information, then
19 Congress did respond. And there were two areas in
20 *Zadvydas* that, you know, didn't warn Congress off. One is
21 the one we're talking about now. The other is terrorism.
22 And Congress responded in the terrorism matter. Is that
23 right? But they didn't do anything on the --

24 MR. MILLS: That's absolutely correct. And
25 they're responding right now. In the 9/11 Commission

1 bill, there is a section that's being negotiated as to
2 whether terrorist aliens who can't be removed because they
3 would be tortured -- whether they can be indefinitely
4 detained. And they're looking at the same limiting
5 language.

6 One point that I'd like to make that I did not
7 get to make directly in the brief, but it was raised.
8 Justice Scalia, you had a question yesterday in the Leocal
9 case, and it -- it raised an issue that I hadn't looked at
10 before on whether a statute can be interpreted differently
11 in a situation where the reason to interpret it is no
12 longer there. And that's the rule of lenity cases.

13 And I cited as a supplemental authority the
14 United States v. Thompson/Center Arms Company, 504 U.S.
15 505. It's a 1992 decision, and it involved a tax code
16 provision. And the question is, do we apply the rule of
17 lenity? And Justice Stevens, in dissent you said no,
18 because this is a civil case. The rule of lenity doesn't
19 apply. But a three-judge plurality, an opinion by Justice
20 Souter, and a two-justice -- two-judge concurrence by
21 Justice Scalia both agreed that the rule of lenity applied
22 because the statute applies both in criminal and civil
23 contexts. And you can't have one meaning in a criminal
24 context and another in civil.

25 For the same reason, the rule of constitutional

1 avoidance should not result in a statute being interpreted
2 one way when there would be a doubt and another way when
3 there would not.

4 JUSTICE SOUTER: Well, what about the argument
5 that the statute, in effect, limits the -- our -- our
6 interpretation limits the -- the detention to a period
7 reasonably related to the Government's interest in
8 accomplishing that interest? That interest is different
9 in -- in the case of -- of aliens who are excluded, if we
10 accept that class as distinct from all excludables. And
11 -- and that may allow a much longer period of detention,
12 among other things, to deter dictators from -- from
13 dumping. You've given us an answer to what to do if they
14 dump, but we don't want them to dump in the first place.
15 That argument stops short of saying we can detain them for
16 life, but it would support the -- the position that on a
17 consistent interpretation of the statute, the Government
18 could detain them longer in the excluded cases than in
19 others. What's your answer to that?

20 MR. MILLS: My answer to that is that that might
21 be a -- a legislative policy decision to make that
22 distinction. But in 1996, IIRIRA abolished the
23 distinction between inadmissible and deportable aliens
24 after they've been ordered removed. Up until that time,
25 it makes a difference. It makes a difference under the

1 Constitution. But once they've been ordered removed --
2 and this was the Government's argument in Zadvydas. Once
3 they've been ordered removed, regardless of how they got
4 here in the first place, they no longer have any right to
5 be here at all and --

6 JUSTICE SOUTER: There is only one class of
7 excludables by the Government's own choice. That's --
8 that's basically your answer.

9 MR. MILLS: After a removal proceeding, there is
10 only one class. That is correct.

11 JUSTICE SOUTER: Yes.

12 MR. MILLS: If there are no more questions, I
13 would just ask that the Court reverse in this case.

14 If there are any mootness concerns about Mr.
15 Benitez, I would refer the Court to Friends of the
16 Environment which said that when a challenged practice has
17 stopped voluntarily, that does not moot a case out in the
18 Supreme Court unless there's some reason to believe they
19 won't go at it again. And the Government has asserted
20 that it can revoke his release at any time for any reason
21 and detain him indefinitely.

22 And the suggestion that the fact that he's been
23 released under the Cuban Review Panel shows that his --
24 he's been protected is -- is not well taken. He was
25 determined, when he first was detained in -- in 2001, that

1 he was eligible under the Cuban Review Panel to be
2 released. It took 3 years and the week before this case
3 was argued in the highest court of the land before the
4 Immigration Service did what its own regulations told it
5 had to do.

6 Thank you very much.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mills.

8 Mr. Kneedler, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

10 ON BEHALF OF THE PETITIONERS

11 MR. KNEEDLER: Thank you, Mr. Chief Justice.

12 Justice Souter, you're exactly right in terms of
13 why the statutory construction or statutory application of
14 the terms in Zadvydas does not control here. The Court's
15 starting point -- again back to page 682 of its opinion,
16 it says, we deal here with aliens who were admitted. The
17 way the Court dealt in the opinion was a matter of
18 statutory construction, and it did it by reading into the
19 statute a reasonable time limitation. What is reasonable
20 for aliens who -- who have been admitted and are subject
21 to what were called deportation is different from aliens
22 who were stopped at the border. And in fact, in the -- in
23 the Court's statutory analysis, it looked to the point
24 that in the Witkovitz jurisdictional statement referring
25 to Congress' constitutional doubts about detention of more

1 than 6 months, those were constitutional doubts about
2 people who were being deported after having been allowed
3 to be here. There has never --

4 JUSTICE SOUTER: What's your -- what's your
5 answer to Mr. -- Mr. Mills' position that the Government
6 has, in fact, statutorily waived that distinction by
7 creating one class of excludables?

8 MR. KNEEDLER: It -- with respect -- with
9 respect, it has not. And -- and if I could -- if I could
10 explain this. This -- going back to Mezei, this Court
11 held and in fact rejected a very similar argument. The
12 rationale of the court of appeals in Mezei was that
13 deportable aliens are subject to an express, not an
14 implied, 6-month limitation. And the court of appeals
15 said the aliens in that -- the alien in that case, once he
16 couldn't be removed to another country, should be released
17 because the purpose of keeping him to return him to
18 another country was no longer being served. This Court
19 rejected that argument, even though there was a statutory
20 express limitation of 6 months for deportable aliens, held
21 that an alien who had been on Ellis Island for 2 years did
22 not have to be released.

23 In reliance on that decision, Congress passed
24 the parole statute to leave the release in -- excuse me --
25 Mezei as after it, but the -- the executive branch has

1 relied on that rationale.

2 The Cuban review regulations that are at issue
3 here have been in place for 15 years under the parole
4 statute. As Congress well knew, when it acted in 1996,
5 the -- this program was the subject of many hearings in
6 Congress. There were cases -- the Barrera case out of the
7 Ninth Circuit sustained a 10-year detention of a Mariel
8 Cuban. It is implausible to believe in 1996, when
9 Congress enacted IIRIRA, that it intended to cut back on
10 the longstanding power of the executive branch to prevent
11 hordes of aliens from coming into our country and to
12 impose an arbitrary 6-month limitation.

13 I -- I think there's no argument that if an
14 alien is detained before removal proceedings are begun,
15 that there is no 6-month limitation. His release is
16 entirely up to the Attorney General under the parole
17 regulations. It's -- it's implausible to believe that
18 once Congress actually enters a formal order of exclusion
19 or now removal against an alien, the person is no longer
20 in an ambiguous situation, the executive branch says
21 you're not eligible, that suddenly that person who has
22 been formerly found not eligible, would be subject to a 6-
23 month limitation that did not apply up until '96 and
24 doesn't even apply until these -- to these aliens until
25 removal proceedings have been begun.

1 So the right way to look at this statute as
2 what's a reasonable time under 1231(a)(6) has to take into
3 account that historic background of the United States
4 being able to protect its borders. And there is no
5 indication whatsoever that Congress intended to overrule
6 this longstanding program for Mariel Cubans, which has
7 operated, as I said, for 15 years.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Kneedler.

10 The case is submitted.

11 (Whereupon, at 12:00 p.m., the case in the
12 above-entitled matter was submitted.)
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